United States Circuit Court of Appeals

For the Ninth Circuit

ELI ROUSSEAU,
Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration for the District of Washington,
Appellee.

No. 3900.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief of Appellant

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STATEMENT OF CASE

This matter is before the court on an appeal from a decision rendered in the United States Dis-

trict Court for the Western Division of Washington, Northern Division, denying the petition of appellant for a writ of Hebeas Corpus.

The appellant is 72 years of age and was born in St. Reni, Canada. He came to the United States when he was nine years of age (p. 3 Dept. of Labor Files) and has lived in the State of Washington since 1883, making his home first in Everett, and then in Mukilteo, (pp. 4-5 Dept. of Labor Files). He voted in this state when it was a territory.

In July, 1919, appellant was charged by information in the State of Washington with the crime of being a "Jointist" and was thereafter accorded a trial and convicted of said charge. Pending appeal to the Supreme Court of the State of Washington he visited relatives in the East and in Canada. When the appellant learned that the judgment of conviction had been affirmed, though without the jurisdiction of the United States, he voluntarily entered the United States through Blaine, Washington, on October 12, 1920, to meet his sentence of from one to five years in the State penitentiary at Walla Walla. He immediately began to serve this sentence.

On December 3, 1920, a Department of Labor warrant for appellant's arrest was issued under the

hand of the acting Secretary of Labor. The material portions of said warrant follow (see Dept. of Labor Files):

"To

HENRY M. WHITE, Commissioner of Immigration, Seattle, Wash.,

Or to any immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien JOSEPH ROUSSEAU who landed at the port of Blaine, Wash., on_____the 12th day of Oct., 1920, has been found in the United States in violation of the immigration act of February 5, 1917, for the following among other reasons:

That he was a person likely to become a public charge at the time of his entry; and that he entered without inspection.

I, ROWLAND B. MAHANY, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said ailen and grant him a hearing _ _ _ _ to enable him to show cause why he should not be deported in conformity with law."

Appellant's hearing took place on January 3, 1921, at the Washington State Penitentiary at Walla Walla; the examination was conducted by a United States Immigrant Inspector in the presence of a hired stenographer (See report of Hearing, Dept. of La-

bor Files). The testimony given therein will be referred to in more detail later. Thereafter the Report of Hearing was submitted to the Department of Labor and on the 15th of February, 1921, a Department warrant was issued for appellant's deportation to Canada for the reason that he had "been found in the United States in violation of the Immigration Act of Feb. 5, 1917," to-wit: "That he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he has been found connected with the management of a house of prostitution or other place habitually frequented by prostitutes, or where prostitutes gather; that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; and that he was a person likely to become a public charge at the time of his entry, and may be deported in accordance therewith." (Tr. p. 9).

The execution of the warrant of deportation was ordered deferred until appellant was released from prison. (Tr. p. 11). On completion of his penitentiary sentence appellant was taken into custody under and by virtue of said warrant and held for deportation. Whereupon appellant sued out this petition for a writ of Habeas Corpus. In answer there-

to a return was made by the appellee which incorporated the Department of Labor files. (Tr. p. 8). A hearing was thereafter had on the issues thus formed and on the 25th day of May, 1922, the District Court filed its decision herein denying said petition (Tr. p. 13) and thereafter on the 3rd day of July, 1922, a formal order was entered denying the petition for writ of Habeas Corpus. (Tr. p. 18). On that date appellant petitioned the District Court for leave to appeal (Tr. p. 19) and said petition was duly granted. (Tr. p. 22).

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ASSIGNMENTS OF ERROR

I

The court erred in dismissing the petition for the Writ of Habeas Corpus.

II

The court erred in holding that appellant was not deprived of a fair hearing by reason of the fact that he was confined in the State penitentiary at the time of said hearing.

III

The court erred in holding that petitioner was not deprived of a fair hearing by reason of the fact

that the examining inspector preferred additional charges at said hearing not contained in the warrant of arrest.

IV

The court erred in holding that petitioner was not deprived of a fair hearing by reason of consideration of a certain ex parte affidavit and letter as a part of the evidence submitted at said hearing, the documents referred to being (1) the affidavit of Carri Scott Karris, marked Exhibit "C" and attached to Dept. of Labor files, in words and figures as follows:

"STATE OF WASHINGTON } SS
COUNTY OF SNOHOMISH }

CARRI SCOTT KARRIS, being first duly sworn on oath deposes and says: That my name is Carri Scott Karris; that I was housekeeper for Joe Rousseau at his place at Mukilteo from about the middle of November, 1918, until about the first of April, 1919; said Rousseau, last fall and winter, made cider from apples on his place and sold it to guests whom he entertained at his said home; that a great many people came there as guests of the place, and he served them with hard cider and he also had moonshine whiskey and also red whiskey; I think he also had some bonded whiskey. He would serve these liquors in single drinks, charging I think twenty-five cents a drink for this whiskey, though it may have been fifty cents, I would not be sure whether it was twenty-five or fifty cents, a drink. He also had on hand and served to his guests, soft drinks

such as near beer, soda pop, etc. These parties generally came there at night-time. There was usually someone there nearly every night who was served with drinks. I saw a great many people drunk at this place. He sometimes entertained guests all night, furnishing them with sleeping quarters. This generally happened when some one would get too drunk to go home. Rousseau would also allow men and women to occupy rooms at this place provided they stated to him that they were man and wife. He paid me no wages for staying at this place, but I had a room and I was allowed to make such money as I could by entertaining men in my said room. I made on an average of $20.00 or $25.00 a week that way. Before I went keeping house for said Rousseau about November 15, 1918, I occupied one of the tenant houses on his premises at Mukilteo near his residence. I occupied that place for about four months. I was living there with a boy with whom I have since been married. There were also three other boys living at this house. I have seen Nellie Laxdahl, Helen Elliott, Francis Stewart, Sigfried Johnson, Florence Young, Tommie (deep sea diver) Jack Ray, Ruby Gordon, Hanlymer, Dorothy _____, Sam Sorrenson, Billie Shields, Charles (long shoreman) Babe Colligan and Billie Waddell. and others.

(Sgd.) Carrie Scott Karris.

Subscribed and sworn to before me this 6th day of September, 1919.

(Sgd.) Quintus A. Kaune (?)
(Seal) Notary Public in and for the State of Washington, residing at Everett "

(2) The letter of the Deputy Prosecuting Attorney of Snohomish County to T. W. Lynch, Acting United States Commisioner of Immigration, Seattle, Washington, marked Exhibit "A" and attached to the

Department of Labor files, which is in words and figures as follows to-wit:

"Everett, Wash., December 28, 1920.

Mr. T. W. Lynch,
Acting U. S. Commission of Immigration,
Seattle, Washington,

Dear Sir:

We are in receipt of your letter of the 17th instant, regarding case of Joseph Rosseau, now serving a sentence in the Washington State Penitentiary on a charge of being a jointist. We inclose herewith a certified copy of the Information, Judgment, Sentence, and Commitment in this case. From this inforation you will gain some idea of the character of the charge against this man.

Our state prohibition law, as amended by Chapter 19 of the Session Laws for 1917, defines a jointist as any one who opens up, conducts or maintains a place for the unlawful sale of intoxicating liquor.

Rousseau is an old-time resident of this city. When the town was wide open he was the king of the "Tenderloin District." The place which he conducted at Mukilteo in this county and for which he was convicted on the charge of being a jointist was a notorious road house. He sold liquor to young girls who came there in parties, some of whom were as young as fourteen years.

We inclose herewith the affidavit of his housekeeper, who is a notorious prostitute, and who was sometime ago living in Seattle. This affidavit gives you some idea of the place he was conducting at Mukilteo.

Although a man with no moral sense whatever, he is nevertheless a man who has a reputation of being

square in all business dealings and a man whose word can be absolutely relied upon. The man simply has no moral sense. He is a man about seventy years of age.

Yours truly,
(Sgd.) Q. A. Kaune (?)
Deputy Prosecuting Attorney."

COPY
QAK/EMR.

V

The court erred in holding appellant was not deprived of a fair hearing by reason of the fact that no opportunity was given him at said hearing to offer testimony explanatory of that elicited from him by the examining inspector.

VI

The court erred in holding that the petitioner had been convicted of a crime involving moral turpitude prior to his entry to the United States in October, 1920.

VII

The evidence is insufficient to sustain the warrant of deportation and the decree of the lower court in affirmance thereof.

The several specifications of error will be discussed in the order made.

The first five invoke the well established doctrine that where the alien has been deprived of a fair

hearing the petition for a writ of Hebeas Corpus should be granted *Ex Parte Radivoeff*, 278 Fed. 227.

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ARGUMENT

I

At the threshold of this discussion we deplore the misdirected zeal of the Department of Labor which demanded that appellant be given his hearing while in prison. We do not urge that the hearing should have been attended with all the formal rules in vogue in trial courts, but we insist that appellant was deprived of elementary rights in this Star Chamber session.

The hearing, so-called, had no element of publicity and was conducted in the State Penitentiary in the presence alone of United States Immigrant Inspector and his stenographer. Appellant, who at the time had served about three months of a one to five year sentence, was asked if he wanted an attorney. Small wonder that with liberty so far away it hardly seemed worth fighting for, he answered "No." Appellant's answers were naturally guarded by unaccustomed prison discipline and the depression which goes with such confinement and we can imagne that his restraint was more actual than figurative. Literally his hands were tied.

What a simple matter it would have been for the Department of Labor to have avoided all suspicion of unfairness by executing the warrant of arrest on Rousseau's release from the Penitentiary and then according him the hearing to which he was entitled. We think a presumption of unfairness not rebutted by the record arises from the facts above enumerated.

II

We now come to further evidence of that which seems part of a studied course to deprive appellant of a fair hearing. We refer to the preference by the examining Inspector of additional charges at the hearing. The warrant of arrest charged appellant with but two violations of the Immigration Act, neither of which the Immigrant Inspector attempted to prove at the hearing. (See Warrant of Arrest attached to Dept. of Labor files). At the hearing the Immigrant Inspector charged appellant with certain additional violations of the Immigration Act of Feb. 5, 1917:

(1) "That he had been convicted of, and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; (2) that he has been found connected with the management of a house of prostitution, or other place habitually frequented by prostitutes, or where prostitutes gather; (3) that he has

been found receiving, sharing in, or deriving benefit from the earnings of a prostitute."

and it is upon these last three grounds that the case of the government is now rested.

Perhaps where the evidence unexpectedly develops further breaches of the Immigration Act of which the examining Inspector was not aware before the hearing, he would be warranted in putting additional charges at that time, but such was not the case here. Nearly a month before the Penitentiary hearing took place the Seattle office of the Department of Labor had possession of certified copies of the Information, Judgment, Sentence and Commitment in the case in which Rousseau had been convicted as a "jointist" and said office also had at that time the affidavit of one Carrie Scott Karris set forth *supra* on pp. 6-7, supporting the other violations relied on. (See letter Deputy Prosecuting Attorney, Snohomish County, marked Exhibit "A," attached to Department of Labor files). These documents were later forwarded to the Immigrant Inspector at Walla Walla with instructions, no doubt, to incorporate them into the testimony given at the hearing. Clearly the Department of Labor was well prepared to foist these additional charges on appellant at the hearing and

the record shows that appellant was as surely unprepared to meet them. The manner in which these additional charges were put contains every element of surprise and was fundamentally disconcerting and unfair. Examination of that portion of the Department of Labor Files in which the additional charges were put, conclusively demonstrates that they were not the result of unlooked for testimony (See pp. 5, 6 and 8, Dept. of Labor files), that they were not relevant nor did they pertain to any testimony that had gone before them. They came like a thunderbolt out of a clear sky. After appellant had testified that

"I don't believe I voted for President. It has been ten or twelve years since I voted for President. They demanded me to bring my papers and I told them that I didn't need them and before I would have a fuss I quit voting, ten or twelve years ago" (p. 5, Dept. of Labor files), he is advised.

"Now, Mr. Rousseau, in addition to the charges contained in the warrant of arrest which I have just explained to you, the further charge is now placed against you, that you are in the United States in violation of the United States Immigration Act approved February 5, 1917, in that you were of the inadmissible classes of aliens at the time of entry to the United States through the port of Blaine, Washington, October 12, 1920, in that you had been convicted of a crime involving moral turpitude prior to your last entry to the United States."

The same may be said of the remaining additional charges put to appellant (See pp. 5, 6, 8, Dept. of Labor files). We find it hard indeed to draw a charitable conclusion from the failure of the Immigrant Inspector to include all the charges which he knew would be made against appellant in the warrant of arrest.

In its decision the District Court passed over this phase of the question by saying:

"The practice of preferring a number of charges against an individual by an examining inspector during a summary hearing is one that should be discouraged. It is not in harmony with the thought of fair dealing." (Tr. p. 17.)

If this statement of the law, mild as it appears to us, is correct we fail to see why the petition of appellant was not granted.

III.

The fourth assignment of error embraces the incorporation of certain ex parte documents, Exhibits "A" and "C," in the record of the testimony given at the hearing. These documents, the affidavit of Carri Scott Karris and the letter of Q. A. Kaune, Deputy Prosecuting Attorney, are set forth in toto on pp. 6-7-8, *supra*. They contain matter of the most prejudicial and damaging nature and

undoubtedly account for the refusal of the Secretary of Labor in passing on the records to exercise the favorable discretion given him under Section III of the Immigration Act, providing that: "Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor and under such conditions as he may prescribe." The District Court while recognizing the incompetency of this sort of testimony (Tr. p. 17) was of the opinion that appellant was not prejudiced because these documents did not prevent a fair hearing on the charge of conviction of a felony or other crime involving moral turpitude. But for the reasons above stated it is clear appellant was substantially prejudiced by the use of said documents.

Here as in *Ex Parte Radivoeff*, 278 Fed. 227,

> "The great test of truth, cross-examination of adversary witnesses, provided for by Department Rule 24 was denied the alien. * * * Not only general principles of law were violated but also department rules. These latter in so far as consistent with law are themselves law and be it noted law for government—for the department as well as for aliens. In connection with the general law of the land, the rules constitute for aliens in deportation proceedings the due process of law guaranteed by the Federal constitution to all men."

And quoting further from the same opinion:

"In deportation hearings, if the department resorts to statements, whether or not verified by inspectors or others, failing to produce the makers of the statements for the aliens cross-examination, it cannot escape the consequence of ex parte and incompetent evidence by any plea of distance or expense."

IV.

The fifth specification of error embraces the neglect of the examining inspector to afford appellant an opportunity, after the examination of appellant was ended, to give testimony *in his own behalf*. It is the usual practice and we cannot account for the fact that it was not allowed appellant, for the examining inspector, after he has completed his case, to advise the alien that he now has an opportunity to offer any evidence on his behalf which would tend to throw light on the subject matter of the hearing. The record is devoid of any such request. This is but another circumstance which unerringly points to the conclusion that appellant was deprived of a fair hearing.

V.

The remaining points will be discussed under the VII specification of error. In ascertaining whether the Department of Labor files show a violation of the Immigration Act of February 5,

1917: "All the grounds set forth in the warrant of deportation," to use the words of the District Judge (Tr. p. 15), "except the first may be disregarded. The testimony shows that the petitioner has property in Mukilteo worth $10,000.00. He was not likely to become a public charge which means one likely to become an occupant of an alms house for want of means of support. *Gegiow v. Uhl*, 239 U. S. 60, or likely to be sent to an alms house and supported at public expense, *Ex Parte Mitchell*, 256 Fed. 299. *Howe v. Ex Rel. Savitsky*, 247 Fed. 292; *Ng Fung He v. White, Immigration Com'r.*, 266 Fed. 765. Any testimony relating to the other grounds of deportation (that appellant had been found connected with the management of a house of prostitution and receiving or deriving benefit from the earnings of a prostitute) shows such act, if any, to have taken place long prior to his entry to the United States in October, 1920." To make plainer the lower court's last remark we quote the controlling portion of the Immigration Act providing for the deportation of "Any alien who *shall be found* connected with the management of a house of prostitution *after such alien shall have entered the United States*, or who *shall* receive, share in or derive benefit from any part of the earnings of any prostitute."

The remaining question is whether the crime of being a "Jointist" is a crime involving moral turpitude within the meaning of the Immigration Act. A "jointist" is described by Sec. 11, Laws of Wash. 1917, page 60, being the "Liquor" statute of Washington as "any person who opens up, conducts or maintains, whether as principal or agent, any place for the unlawful sale of intoxicating liquors." The crime is made punishable by imprisonment for not less than one nor more than five years, and would come within the definition of a felony, under the Federal laws. Sec. 335, Penal Code. The language of the act is "Persons who have been convicted or who have admitted the commission of a felony or other crime or disdemeanor involving moral turpitude." The lower court took the position that conviction of a felony is ground for exclusion. It seems plain to us, however, that "moral turpitude" was intended to modify "felony" as well as the other nouns directly preceding it. In any event, appellant who was at the hearing only apprised of the charge that he had "been convicted of a crime involving moral turpitude" (Tr. p. 5), cannot be deported on a broader ground.

In *U. S. v. Uhl*, 210 Fed. 860, the alien had been convicted and sentenced to 12 months' impris-

onment in England on an indictment laid under a libel act providing for the punishment of any person who shall "maliciously publish any defamatory libel." The libel charged the King of England with bigamy. The question was presented whether the crime involved moral turpitude and the court, after holding that it did not, laid down the rule that in order to hold as a matter of law that a crime involves moral turpitude it must appear to be of the essence and an essential element of said crime and that "This rule confines the proof of the nature of the offense to the judgment." The court there used an illustration analagous to the instant case.

"A statute of the United States (Rev. St. Sec. 2139) makes it a crime to give a glass of whiskey to an Indian under charge of an Indian Agent. A conviction under this section would not be proof of moral turpitude though the evidence at the trial might disclose the fact that the whiskey was given for the basest purposes."

It is to be borne in mind that the crime of "jointist" is one unknown to the common law and that before the enactment of the liquor law the acts prohibited by that law were not in disrepute. The legislative body enacting the clause in question intended, we think, to draw a distinction between crimes of an infamous nature and those which did

not essentially involve moral turpitude. The dividing line may be drawn by placing on the one side those crimes which are *malum prohibitum* and on the other those which are *malum in se*. The lower house of Congress has recently accepted this view in passing a bill providing for the deportation of an alien convicted of a violation of either the Volstead or Harrison Narcotic Acts. We submit that the crime of which appellant was convicted was not one involving moral turpitude.

The principle is too well settled to need citation that where the grounds for the alien's deportation are unsupported by the record the Department of Labor will be considered to have acted without jurisdiction in issuing the warrant of deportation and that this is a matter of law for the court.

We ask that appellant's petition for a writ of habeas corpus be granted for the following reasons:

(1) That appellant was denied a fair preliminary hearing.

(2) That there is nothing in the record showing a violation of the Immigration Act.

Respectfully submitted,

POE & FALKNOR,
Attorneys for Appellant.